

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>RICHARD GOODIN</b>	:	ORDER
	:	DTA NO. 816623
for Redetermination of a Deficiency or for Refund of	:	
Personal Income Tax under Article 22 of the Tax Law	:	
and the New York City Administrative Code for the	:	
Years 1990, 1991, 1992 and 1993.	:	

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Petitioner, Richard Goodin, 19 Willoughby Avenue, Brooklyn, New York 11205, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law and the New York City Administrative Code for the years 1990, 1991, 1992 and 1993.

A Notice of Intent to Dismiss Petition was mailed to petitioner, Richard Goodin, on July 23, 1998. On July 30, 1998 and August 20, 1998, the Division of Tax Appeals received written comments and documents from petitioner and the Division of Taxation on the proposed dismissal as authorized under section 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal. Petitioner appeared by Howard R. Rosenthal, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Christina L. Seifert, Esq., of counsel).

Based upon all the pleadings and proceedings had herein, including information contained in the Division of Tax Appeals file, Thomas C. Sacca, Administrative Law Judge, renders the following order.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) issued to petitioner, Richard Goodin, a Notice of Deficiency, dated September 23, 1996, asserting additional personal income tax due in the amount of \$48,553.37 plus interest of \$17,019.66 and penalty of \$25,369.62, for a total amount due of \$90,942.65 for the years 1990, 1991, 1992 and 1993. The additional tax is based upon petitioner having filed Federal income tax returns with a New York State address for the years at issue but failing to file any corresponding New York State personal income tax returns. The figures on the Federal income tax returns were used to compute the New York State tax liability. The Notice of Deficiency is addressed to “Goodin-Richard, 73 Lefferts Pl, Brooklyn, NY 11238-2805.”

The Notice of Deficiency referred petitioner to an enclosed Notice of Taxpayer Rights and instructed petitioner that he had the option of requesting a conciliation conference with the Bureau of Conciliation and Mediation Services (“BCMS”) or petitioning for a tax appeals hearing. The notice then stated, in part, that “You must file a Request for Conciliation Conference or a Petition for a Tax Appeals Hearing by 12/22/96. If we do not receive a response to this notice by 12/22/96: This notice will become an assessment subject to collection action.”

2. On January 29, 1997, the Internal Revenue Service notified the Division of an audit of petitioner’s Federal income tax returns for the years 1991 and 1992. The effective date of the Federal changes was August 8, 1996. On June 22, 1998, the Division issued to petitioner a Response to Taxpayer Inquiry following a review of the information which it had received from the Internal Revenue Service. The document stated that the tax years 1990 and 1993 were not changed following the Division’s review. However, tax years 1991 and 1992 were adjusted based on notification from the Internal Revenue Service that it had adjusted petitioner’s Federal

income tax returns for such years. The Internal Revenue Service adjusted petitioner's business expenses, rental losses, self-employment tax deduction and itemized deductions. These adjustments increased petitioner's New York personal income for the years 1991 and 1992, resulting in tax due for the four years of \$65,312.15, interest due of \$39,797.06 and penalty due of \$36,713.66 for a total amount due of \$141,822.87. The tax, interest and penalty due by year is as follows:

<b>Tax Period</b>	<b>Tax Amount</b>	<b>Interest</b>	<b>Penalty</b>	<b>Total Due</b>
12/31/90	\$13,796.15	\$10,907.35	\$ 9,025.74	\$ 33,729.24
12/31/91	22,613.00	14,464.31	13,129.34	50,206.65
12/31/92	17,707.00	9,459.72	9,207.26	36,373.98
12/31/93	11,196.00	4,965.68	5,351.32	21,513.00
<b>TOTALS</b>	<b>\$65,312.15</b>	<b>\$39,797.06</b>	<b>\$36,713.66</b>	<b>\$141,822.87</b>

Petitioner did not notify the Division of the Federal audit, nor did he file a report of Federal changes with the Division as required by Tax Law § 659.

3. Petitioner filed a petition with the Division of Tax Appeals dated July 10, 1998, which was mailed on July 14, 1998 by certified mail, return receipt requested. The petition related to the Notice of Deficiency issued on September 23, 1996. In his petition, petitioner stated that he was audited for the years 1991 and 1992 by the Internal Revenue Service and that it was the opinion of his accountant that the previous accountant had handled it improperly. His current accountant was therefore requesting that the audit be reopened. Petitioner was requesting that New York State hold the years open until the Internal Revenue Service had completed its reaudit, which he believed would be held shortly.

4. On July 23, 1998, the Petition Intake, Review and Exception Unit of the Division of

Tax Appeals issued a Notice of Intent to Dismiss Petition. The notice stated:

You are hereby notified of our intent to dismiss the petition in the above referenced matter.

Pursuant to § 689(b) of the Tax Law, a petition must be filed within ninety days from the date a Notice of Deficiency is issued.

The Notice of Deficiency was issued on September 23, 1996 but the petition was not filed until July 14, 1998 or six hundred and fifty-nine days later.

Pursuant to § 3000.9(a)(4) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments on the proposed dismissal.

5. In response to the foregoing notice, the Division mailed a letter, dated August 19, 1998, which included affidavits of Geraldine Mahon and James Baisley explaining the mailing procedures for notices of deficiency. The Division also included a copy of the certified mail record (“CMR”) relating to the Notice of Deficiency dated September 23, 1996. Both Ms. Mahon and Mr. Baisley are Division employees.

6. Geraldine Mahon is the principal clerk of the CARTS (Case and Resource Tracking System) Control Unit of the Division, which is the Division’s computer system for generating notices of deficiency to taxpayers under Article 22 of the Tax Law.

In her affidavit, Ms. Mahon stated that she supervises the processing of notices of deficiency prior to their shipment to the Division’s mechanical section for mailing. As part of her duties, she receives a computer printout, titled Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail, referred to as a “certified mail record,” and the corresponding notices of deficiency generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a “certified control number,” which is recorded on the certified mail record. The name and address of the person to whom

the notice is to be mailed on a particular day is also recorded on the CMR.

Attached to Ms. Mahon's affidavit as Exhibit "A" is a copy of a 25-page CMR containing a list of the notices allegedly issued by the Division on September 23, 1996. This CMR contains information relating to petitioner's notice and is a true and accurate copy of the original CMR. Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not parties to this proceeding.

On this copy of the CMR, the certified control numbers run consecutively from P 911 002 754 on page 1 to P 911 003 025 on page 25, with 11 entries per page except pages 16 and 24, which contain 10 entries on each page (1 of the original 11 entries on each page was crossed out) and page 25, which contains only 8 entries, as well as the total figures for the certified mail record. All 25 pages of the CMR bear the print date of September 13, 1996, changed manually on the first page only to September 23, 1996. Each of the 25 pages is date stamped September 23, 1996 by the Colonie Center Branch of the U.S. Postal Service ("USPS") in Albany, New York. Ms. Mahon explained in her affidavit that the print date for certified mail records is approximately ten days prior to the mail date in order to allow the Division's mechanical section sufficient time to manually review the notices and to process the postage. She notes that the print date here was changed by personnel in the Division's mailroom to conform to the actual date of delivery of the notices to the USPS. She also states that the original document consisted of 25 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the Postal Service; and that the pages remain connected when the postmarked document is returned by the USPS after mailing. She further explained that each notice is placed in an envelope by Division personnel and then delivered into the possession of a USPS representative, who then affixes his or her

initials (or signature) or a USPS postmark or both to a page or pages of the CMR. Here, the Postal Service representative affixed his or her initials to page 25 of the certified mail record, affixed a postmark to each individual page of the certified mail record and circled the “total number of pieces” on the certified mail record. Ms. Mahon states that the USPS postmark appearing on each page of the certified mail record, including specifically page 14 of the certified mail record on which the notice at issue appears, confirms that such notice was sent on September 23, 1996. The certified mail record indicates that the Notice of Deficiency sent to petitioner was assigned control number P 911 002 898. In addition, Ms. Mahon stated that, in the regular course of its business, the Division does not request, demand or retain return receipts from certified or registered mail.

It is noted that while the certified mail record contains, on page 25, the total number of pieces listed, 270, it does not contain a total number of pieces received at the post office. On page 25, the number 270 is circled on the line entitled “TOTAL PIECES AND AMOUNT LISTED.” Above the circled number 270 are the USPS postmark and, below the circled number 270, presumably the initials of the postal representative.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS Control Unit, and that as such the certified mail record corresponding to the notice issued to petitioner was properly prepared on September 23, 1996.

7. The affidavit of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center (“mailroom”), attests to the regular procedures followed by the mailroom staff in the ordinary course of its business of delivering outgoing certified mail to branch offices of the USPS. After a notice is placed in the “Outgoing Certified Mail” basket in the mailroom, a member of Mr. Baisley’s staff counts the envelopes and verifies the names and certified mail

numbers against the information contained on the CMR. Each envelope is weighed and sealed and the appropriate postage and fee is placed on each one. A member of the mailroom staff delivers the CMR and envelopes to the Colonie Center Branch of the USPS. Mr. Baisley states that the CMR is the Division's record of receipt by the Colonie Center Branch of the USPS for pieces of certified mail. The postal employee who received the CMR affixed a USPS postmark to every page of the CMR, circled the total number of pieces and initialed the CMR to indicate the number of pieces received from the Division. After the CMR has been signed and stamped by the USPS, it is returned the following day to the originating office within the Division (here CARTS Control Unit). Mr. Baisley avers that "[t]he USPS has further been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record."

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that, on September 23, 1996, an employee of the mailroom delivered a sealed, post-paid envelope for delivery by certified mail addressed to Richard Goodin, 73 Lefferts Pl, Brooklyn, NY 11238-2805 to the Colonie Center Branch of the U.S. Postal Service in Albany, New York. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the certified mail record, with the postmark, delivered to and accepted by the Postal Service on September 23, 1996 for the records maintained by the CARTS control unit of the Division. He affirms that the staff's regular procedures were followed in mailing the piece of certified mail in question to petitioner.

8. Petitioner responded to the Division of Tax Appeals' Notice of Intent to Dismiss Petition by letter of his representative, Howard R. Rosenthal, CPA. Mr. Rosenthal stated in his

letter that the previous accountant never informed him of the Notice of Deficiency. In addition, Mr. Rosenthal is of the opinion that the 1991 and 1992 Federal tax liabilities will be reduced and he has requested the Internal Revenue Service to reopen the audit for those years. He is currently waiting for their reply.

### ***CONCLUSIONS OF LAW***

A. Pursuant to Tax Law § 681(a):

[i]f upon examination of a taxpayer's return . . . the [Division of Taxation] determines that there is a deficiency of income tax, it may mail a notice of deficiency to the taxpayer . . . . A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at his last known address in or out of this state.

Tax Law § 681(b) provides, in relevant part, that:

[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . .

B. Upon receipt of the notice of deficiency, a taxpayer has the option of requesting a conciliation conference with BCMS, rather than filing a petition (20 NYCRR 4000.3[a]). Such a request must also be filed within the 90-day period for filing a petition and effectively suspends the running of the limitations period for the filing of a petition (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[c]). If a taxpayer fails to file a petition or a request for a conciliation conference protesting the statutory notice, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989).

C. Where the timeliness of a protest is at issue, the Division bears the burden of proof to demonstrate the proper mailing of the documents protested (in this case, the Notice of



Deficiency) which begins the running of the 90-day statutory period (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *see also, Cataldo v. Commissioner*, 60 TC 522, *affd* 499 F2d 550, 74-2 US Tax Cas ¶ 9533). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (*see, Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994; *Matter of Accardo*, Tax Appeals Tribunal, August 12, 1993; *Matter of Air Flex Custom Furniture*, *supra*; *Matter of Katz*, *supra*; *Matter of Novar TV & Air Conditioner Sales & Serv.*, *supra*; *see also, Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111; *Cataldo v. Commissioner*, *supra*).

D. As noted in Conclusion of Law “C”, the required proof of mailing is two-fold: first, there must be proof of the Division’s standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Mahon and Mr. Baisley in support of its position that the Notice of Deficiency was issued to petitioner on September 23, 1996.

The affidavits of Ms. Mahon and Mr. Baisley contain sufficient proof to establish the standard procedure of the Division for issuing notices of deficiency (*see, Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). The affidavits show that, as each notice is generated, a certified control number is assigned to each. In the process, a certified mail record is generated which contains the name and address of the taxpayer to whom the notice was issued, the assessment number of the notice and the certified control number assigned to the notice.

Second, the Division established that the general issuance procedure was followed on September 23, 1996 in the generation and mailing of petitioner's notice. Specifically, the affidavits of Ms. Mahon and Mr. Baisley, together with the certified mail record, show the total number of pieces received by the USPS, and the postmarks on the CMR, in turn, show the date of mailing as September 23, 1996 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995). It is observed that the CMR used by the Division contains most of the significant elements of Postal Service Form 3877, and serves the same purposes of establishing the Postal Service receipt of the items listed thereon. The Division is not required to produce employees who personally recall the mailing of each notice. Rather, evidence of the Division's standard mailing procedure corroborated by documentary evidence of actual mailing is sufficient. Finally, it is noted that the figure "270" on the last page of the CMR, signifying the total number of pieces of mail involved, has been circled. As in *Matter of Roland (supra)*, the Division's affiant (here Mr. Baisley) states that the circling of this figure indicates that this was the number of pieces of mail received by the USPS. In addition, and unlike the situation in *Roland*, the affiant here also states the basis of his knowledge for this proposition. That is, the Baisley affidavit states that the Division's Mail Processing Center specifically requested that postal employees indicate the total number of pieces received by the USPS by either circling the number or writing the number on the certified mail record. This additional fact provides the element found to be lacking in *Roland*. Accordingly, consistent with the reasoning in *Roland*, the Division has met its burden of proof on the question of actual mailing in this case.

E. Tax Law § 681(a) requires the Division to send notice by certified or registered mail when it determines that there is an income tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known

address is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 335 NYS2d 1028; *cf., Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places the risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*). Once the statutory notice is mailed, the taxpayer has 90 days within which to petition for a redetermination (Tax Law § 689[b]).

Petitioner does not challenge the date or method of mailing of the Notice of Deficiency. Furthermore, review of the petition filed in this matter indicates that petitioner does not dispute that the Notice of Deficiency was issued to him at his last known address. The Division has established that it mailed the Notice of Deficiency to petitioner on September 23, 1996 at his last known address.

F. As noted in Conclusions of Law “A” and “B”, a Notice of Deficiency becomes an assessment unless the taxpayer requests a conciliation conference with BCMS or files a petition with the Division of Tax Appeals within 90 days after the notice is issued. The last day on which petitioner could have timely requested a conciliation conference with BCMS or filed a petition with the Division of Tax Appeals was December 22, 1996. The petition was filed with the Division of Tax Appeals on July 14, 1998. Unfortunately, this date is well past the statutory 90-day period within which such a request may be made. Accordingly, the request was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner’s case.

G. Tax Law § 659 requires a taxpayer to report any changes or corrections by the United

States Internal Revenue Service of Federal taxable income to the Division of Taxation within 90 days after the final determination of such change or correction, and shall concede the accuracy of such determination or state wherein it is erroneous. Petitioner did not do so in this case, and thus he has conceded the accuracy of the Federal determination.

H. It is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

Finally, pursuant to Tax Law § 659, should the Internal Revenue Service make any adjustments to his Federal taxable income as a result of the reaudit requested by petitioner, those changes are required to be reported by petitioner to the Division, and petitioner will receive any benefits resulting therefrom.

I. The petition of Richard Goodin is hereby dismissed.

DATED: Troy, New York  
November 25, 1998

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE